

October 18, 2004

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: National Security Archive

Date of Filing: May 6, 2004

Case Number: TFA-0060

The National Security Archive (the Appellant) filed an Appeal from a determination that the Department of the Air Force (the Air Force) issued on April 15, 2004. In that determination, the Air Force denied in part a request for information that the Appellant submitted on March 1, 2001, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The Air Force released portions of the document the Appellant requested, but also withheld portions of the document. That information was withheld as the result of reviews of the documents by the Department of Energy (DOE)'s Office of Classification and Information Control and the Air Force's Headquarters Air Combat Command, after which they determined that the document contained classified information. This Appeal, if granted, would require the DOE to release the information that the DOE withheld from those documents.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b).

I. Background

On March 1, 2001, the Appellant requested a copy of the January-June 1964 Strategic Air Command History, Chapters I, II, III, IV and VII. The Air Force responded to the request by providing portions of that document to the Appellant. However, the Air Force withheld from release portions of the document pursuant to (1) the Air Force's determination that some of the withheld information was properly classified in accordance with Executive Order 12958 and therefore warranted protection from disclosure under Exemption 1 of the FOIA and (2) the DOE's determination that some of the withheld information was classified in accordance with the Atomic Energy Act, 42 U.S.C. §§ 2161-2166, and therefore

warranted protection from disclosure under Exemption 3.

The present Appeal seeks the disclosure of the withheld information described above. In its Appeal, the Appellant contends that “information on the aggregate nuclear yield of [Strategic Air Command] bombers and missiles during 1964 is already declassified and has been in the public domain since the 1970s.” In addition, it contends that any information that has not already been declassified should now be released as well:

There are no good public policy reasons why they must remain classified. The numbers have long been overtaken by events. . . . Releasing the numbers would disclose gross nuclear capabilities that are now decades old. The yield numbers have no relevance to the current situation and certainly will be of no use to terrorists or hostile states who wish to acquire nuclear weapons today. . . . Historians, social scientists, and the interested public, however, do need this information. By making such information available, the Energy Department will contribute to better understanding of the Cold War and the nuclear era.

Appeal at 1.

II. Analysis

Exemption 3 of the FOIA provides for withholding material “specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld.” 5 U.S.C. § 552(b)(3); *see* 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. *See, e.g., National Security Archive*, 26 DOE ¶ 80,118 (1996); *Barton J. Bernstein*, 22 DOE ¶ 80,165 (1992); *William R. Bolling, II*, 20 DOE ¶ 80,134 (1990).

The Director of the Office of Security (the Director), has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 00-030.00, Section 1.8 (December 6, 2001). Upon referral of this appeal from the Office of Hearings and Appeals, the Director reviewed those portions of the requested documents for which the DOE had claimed exemptions from mandatory disclosure under the FOIA.

According to the Director, the DOE determined on review that, based on current DOE classification guidance, some of the material the DOE withheld from the document may now be released. The information that the DOE continues to withhold concerns the military utilization of nuclear weapons including exact numbers of weapons and yields of weapons. This information is currently classified as Formerly Restricted Data (FRD) and is identified

as “DOE (b)(3)” in the margin of a newly redacted version of five pages of the document, which will be provided to the Appellant under separate cover. FRD is a form of classified information the withholding of which is required under Atomic Energy Act of 1954, and is therefore exempt from mandatory disclosure under Exemption 3. The denying official for the DOE’s withholdings is Mr. Marshall Combs, Director, Office of Security, Department of Energy.

The Air Force also reviewed the document, and determined that it will continue to withhold one item of information on the fifth page of the newly revised version concurrently with the DOE. That item is the first deletion on the page, and is marked in the margin as “D2NP.” The Air Force is withholding that information pursuant to Exemption 1 of the FOIA. Exemption 1 provides that an agency may exempt from disclosure matters that are (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of the national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.” The Air Force identified the information described above as National Security Information properly classified in accordance with Executive Order 12958. The denying official for the Air Force’s withholdings is Jeffrey M. Coleman, Colonel, USAF Chief, Nuclear Operations, C2 and Arms Control Division.

Based on the Director’s review, we have determined that the Atomic Energy Act requires DOE to continue withholding portions of the document under consideration in this Appeal. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, such consideration is not permitted where, as in the application of Exemption 3, the disclosure is prohibited by executive order or statute. Therefore, those portions of the document that the Director has now determined to be properly classified must be withheld from disclosure. Nevertheless, the Director has reduced the extent of the previously deleted portions to permit releasing the maximum amount of information consistent with national security considerations. Therefore, the DOE will release a newly redacted version of a portion of the document reviewed in this Appeal to the Appellant under separate cover. Accordingly, the Appellant’s Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

- (1) The Appeal filed by the National Security Archive on May 6, 2004, Case No. TFA-0060, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.
- (2) A newly redacted version of a portion of the document in which additional information is released will be provided to the National Security Archive.
- (3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in

the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 18, 2004